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Supreme Court, U.S.
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No. 93-1354

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

SAMUEL LEWIS, Director, Arizona Department of Corrections, and GRANT WOODS, Arizona Attorney General,

Petitioners,

-vs-

PETER ALLEN JACOBY,

Respondent.

On Petition for Writ of Certiorari to the United Stats Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION TO CERTIORARI

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QUESTIONS PRESENTED

I. Whether this Court should grant certiorari to determine whether the court of appeals correctly reached the merits of an issue raised in habeas corpus that had been decided on its merits by the last state court to issue a decision, particularly when no conflict exists between the courts of appeals.

II. Whether this Court should grant certiorari to again rule that jury instructions which shift the burden of proof to the defense violate due process. Whether this error was prejudicial in light of the fact that Respondent was convicted only of the charges affected by the erroneous instruction.

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STATEMENT OF THE CASE

The Statement of the Case provided by Petitioners, government officials for the State of Arizona, is -- in one sense -- accurate. It is accurate in that all of the facts that it contains are supported by the record. However, omissions from that statement result in a misleading rendition of the facts. For that reason, the following statement of pertinent facts is provided.[1]

Respondent, Peter Allen Jacoby, was charged in the state trial court with four counts of burglary, four counts of controlling property stolen in those burglaries, one count of trafficking in stolen property, and one count of possession of cocaine.[2]

Mr. Jacoby was arrested on the trafficking in stolen property charge after he sold a clarinet that had been taken in a residential burglary. A search of his truck incident to that arrest revealed a vial of cocaine on the truck seat next to where Mr. Jacoby had been sitting.[3] A search of the bed of the truck resulted in the seizure of property stolen in three separate burglaries. This property formed the basis for three of the burglary and three of the theft counts.

Mr. Jacoby was released following that arrest. Police officers later followed him to a residence; when he left, the

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[1]For a more detailed statement of the facts, see the Arizona Court of Appeals memorandum decision, Petitioners' Appendix A, at 2-4.

[2]Mr. Jacoby faced other charges, but they have no relevance here.

[3]This vial formed the basis for the possession of narcotics charge.

officers discovered that the residence had been burglarized. Mr. Jacoby was arrested for that burglary and the accompanying theft.

At trial, Mr. Jacoby testified in his own defense as follows:

1. As to the cocaine charge, although he admitted having a "severe cocaine problem"[4], he denied having any knowledge of the cocaine found on his truck seat.
2. As to the trafficking in stolen property charge, he denied knowing that the clarinet was stolen.
3. As to the burglary and theft charges arising from the property found in his truck at the time of his first arrest, he stated that he was moving the property for a friend and did not know that it was stolen.
4. He admitted having committed the burglary and theft preceding his second arrest.

The trial court gave the following instruction pertinent to the trafficking and theft charges:

> Proof of possession of property recently stolen, unless satisfactorily explained, gives rise to an inference that the person in possession of the property was aware of the risk that it had been stolen or in some way participated in the theft.

The jury returned guilty verdicts only on the charges affected by the foregoing instruction (the trafficking and three theft charges) and the offenses to which Mr. Jacoby confessed in his trial

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[4]Pet. App. A, at 4.

testimony (one count of burglary and one count of theft[5]). He was acquitted of the cocaine charge. The jury could not reach a verdict on the other burglary charges, which were subsequently dismissed.

Trial counsel for Mr. Jacoby did not object to the foregoing instruction. Mr. Jacoby did argue in the Arizona appellate courts and in his habeas action that the instruction violated his right to due process.

ARGUMENT

I

THE COURT OF APPEALS WAS CLEARLY CORRECT IN DECIDING THIS CASE ON ITS MERITS. NO CONFLICT EXISTS BETWEEN THE CIRCUITS.

The Ninth Circuit Court of Appeals was clearly correct in deciding the merits of Mr. Jacoby's claim. In attempting to convince this Court that the court of appeals erred in deciding this case on its merits, Petitioners assert that the court of appeals memorandum decision is contrary to the decisions of this Court. Petitioners' claim is based on a misunderstanding of the law of preclusion applicable to habeas corpus proceedings, as well as a misstatement of Arizona's waiver rule. Next, Petitioners claim that a conflict exists between the First and Ninth circuits, and ask this Court to resolve it. An examination of the cases reveals, however, that no such conflict exists. For the following reasons, no error occurred below and no sound basis exists for the

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[5]Mr. Jacoby did not challenge those convictions by his petition for a writ of habeas corpus, and they are not at issue here.

granting of certiorari.

A. Applicable Supreme Court Law

The Petition for Certiorari opens with an inaccurate statement of the law of preclusion. Petitioners assert that a state procedural bar will automatically be applied by the federal courts "so long as the state has a contemporaneous objection rule and has not waived its enforcement." Petition for Certiorari, at 8-9.

In *Harris v. Reed*, 489 U.S. 255, 261 (1989), the Court clearly stated, "[T]he mere fact that a federal claimant failed to abide by a state procedural rule does not, in and of itself, prevent this Court from reaching the federal claim . . ." The Court later explained, "In habeas, if the decision of the last state court to which the petitioner presented his federal claims fairly appeared to rest primarily on resolution of those claims, or to be interwoven with those claims, and did not clearly and expressly rely on an independent and adequate state ground, a federal court may address the petition." (footnote omitted). *Coleman v. Thompson*, 501 U.S. ___, 111 S.Ct. 2546, 2557, 115 L.Ed.2d 640 (1991). The state court of appeals' analysis of the substantive issue presented here applied decisions from this Court interpreting the due process clause of the fourteenth amendment, and was clearly not independent of the federal claim.

On direct appeal, the state court first made note of the decisions from this Court relevant to the issue of whether the challenged instruction violated due process. Pet. App. A, at 5-6. The court then recognized that a conflict existed between the

Arizona intermediate appellate courts as to the constitutionality of the instruction. *Id.* at 6-7. Finally, the court stated that, due to trial counsel's failure to object, Mr. Jacoby could prevail only if the instruction constituted "fundamental error". The court rejected Mr. Jacoby's claim, stating that it had "expressly held" that the challenged instruction did not constitute "fundamental error". *Id.* at 7, *citing State v. Dickson*, 127 Ariz. 554, 622 P.2d 501 (App. 1980) and *State v. Van Winkle*, 126 Ariz. 476, 616 P.2d 936 (App. 1980).

Arizona's appellate courts have chosen to include federal constitutional error in their definition of "fundamental error"; the state courts must determine whether the Constitution was violated to determine whether fundamental error occurred. In fact, the state appellate decision in this very case proves that point. The court stated that the challenged instruction had been held not to constitute "fundamental error" in *State v. Dickson* and *State v. Van Winkle*, *supra*. In *Dickson*, 662 P.2d at 501, the holding that fundamental error occurred came in the statement, "The instruction was not a denial of due process," *citing Sandstrom v. Montana*, 442 U.S. 510 (1979). Similar language was used in *Van Winkle*, which also cited *Sandstrom*. 616 P.2d at 937. The Arizona Supreme Court has very clearly and simply pronounced that its search for fundamental error includes a search for constitutional error; in *State v. Burton*, 144 Ariz. 248, 697 P.2d 331, 334 (1985), the court stated, "Constitutional error is one form of fundamental error." Under substantially identical circumstances, this Court recognized

that a search for constitutional error by a state court precludes a finding that the state procedural bar is "independent" of federal law. *Ake v. Oklahoma*, 470 U.S. 68, 75 (1985).

Petitioners seek to draw this Court's interest with a claim that, "Because Arizona appellate courts review every criminal case for fundamental error, a criminal defendant will never be found to have procedurally defaulted on any issue raised on appeal even though the defendant failed to raise the issue at trial." Petition for Certiorari, at 11. First, the claim that the state appellate courts search for fundamental error in every case is unsupported. More importantly, however, the decision of whether the state courts will review federal constitutional claims that were not preserved at trial is a decision for the state courts. Even assuming that Arizona's courts conduct such a review, that fact is not of concern to this Court. The rules requiring federal courts to abide by state court findings of preclusion are premised on:

> "[T]he doctrine of comity, which 'teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter.' *Darr v. Burford*, 339 U.S. 200, 204 (1950)." [*Rose v. Lundy*], 455 U.S. [509], 518 [(1982)].

Coleman v. Thompson, 111 S.Ct. at 2555. By considering issues of fundamental error (including constitutional error) first raised on direct appeal, the Arizona courts exercise their opportunity to pass upon the merits of those issues. Under these circumstances, there is no reason for the federal courts to refrain from reviewing

such state court rulings. If Petitioners are unhappy with the fact that Arizona's courts decline to bar appellants from litigating federal constitutional issues first raised on direct appeal, Petitioners must complain to the Arizona courts.

B. Absence of Conflict Between Circuits

Petitioners also seek to draw this Court's attention by claiming that the court of appeals decision in the present case conflicts with the decision from the First Circuit Court of Appeals in *Puleio v. Vose*, 830 F.2d 1197 (1st Cir. 1987). A comparison of the respective bases for the two decisions reveals that no such conflict exists.

In *Puleio*, the habeas petitioner raised an objection to a jury instruction for the first time in his direct appeal to the state supreme court in contravention to the state's contemporaneous objection rule. *Id.* at 1199. The court reviewed the claim of error to determine whether, under state law, a miscarriage of justice occurred; this review did not include a search for federal constitutional error. In the words of the First Circuit:

> It is altogether evident that the [state supreme court's] consideration of the alleged instructional error in Puleio's case "went not to the *federal* question of . . . constitutional sufficiency, but to the *state* law question of whether a 'substantial risk of a miscarriage of justice' was present." *Gibson v. Butterworth*, 693 F.2d 16, 17 (1st Cir. 1982)(emphasis in original).

Id. at 1200. In short, the Arizona state courts have chosen to review issues first raised on direct appeal for constitutional error; the Massachusetts courts have chosen not to conduct such a

review. This distinction is the basis for the opposite conclusions reached by the federal appellate courts in *Puleio* and in the case at bar.

Should any doubt remain, the First Circuit pointed out that the state supreme court in *Puleio* made no reference to federal law or decisions. *Id.* at 1201. In contrast, the Arizona decision in the present case, as well as the decisions on which it relied, *State v. Dickson* and *State v. Van Winkle, supra*, cited opinions from this Court applying the Due Process Clause to burden shifting jury instructions.

In summary, the court of appeals memorandum decision in the present case is perfectly consistent with this Court's rulings concerning preclusion. There is no conflict between the First Circuit and the Ninth Circuit. There is therefore no reason for this Court to consider the merits of Petitioners' claim.

II

THE INSTRUCTION AT ISSUE VIOLATED DUE PROCESS AS DEFINED BY THIS COURT. THE INSTRUCTION AFFECTED THE OUTCOME OF THE TRIAL.

A. The Instruction Shifted the Burden of Proof.

One of the most fundamental dictates of due process is that the prosecution must prove every element of a criminal accusation beyond a reasonable doubt. *See, e.g., Sullivan v. Louisiana*, ___ U.S. ___, 113 S.Ct. 2078, 2080-2081, 124 L.Ed.2d 182 (1993); *In re Winship*, 397 U.S. 358 (1970). This Court has repeatedly ruled that a jury instruction which shifts the burden of proof to the defense violates the Due Process Clause. *Frances v. Franklin*, 471 U.S. 307 (1985); *Sandstrom v. Montana*, 442 U.S. 510 (1979); *Patterson v. New*

York, 432 U.S. 197 (1977); *Mullaney v. Wilbur*, 421 U.S. 684 (1975); *In re Winship, supra.*[6]

In the present case, the state trial court instructed the jury that the possession of recently stolen property "gives rise to an inference that the person in possession of the property was aware of the risk that it had been stolen . . ." (Pet. App. A, at 5). The instruction further informed the jury that this presumption existed unless the defendant was able to "satisfactorily explain" his possession of the property. (*Id.*). This instruction was critical due to the fact that Mr. Jacoby did not dispute that he possessed stolen property, but did dispute the claim that he was aware that the property had been stolen. *See Sandstrom v. Montana*, 442 U.S. at 521-522, *quoting Morissette v. United States*, 342 U.S. 246, 274-275 (1952).

It is clear that the challenged instruction violated the consistent rulings of this Court. The Court has distinguished between "permissive inferences" - which comply with due process - and "mandatory presumptions" - which do not. *Frances v. Franklin*, 471 U.S. at 313-314. More specifically:

> A mandatory presumption instructs the jury that it must infer the presumed fact if the State proves certain predicate facts. [Footnote omitted] A permissive inference suggests to the jury a possible conclusion to be drawn if the State proves predicate facts, but does not require the jury to draw that

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[6]Although Division Two of the Arizona Court of Appeals held that Mr. Jacoby's constitutional rights were not violated by the challenged instruction (Pet. App. A, at 6-8), Division One of the same court held to the contrary. *See State v. Mohr*, 150 Ariz. 564, 724 P.2d 1233, 1236 (App. 1986).

conclusion.

Id. at 314. If a reasonable juror "could have" interpreted a challenged instruction as creating a mandatory presumption, a due process violation is established. *Id.* at 315, *quoting Sandstrom v. Montana*, 442 U.S. at 514.

The challenged instruction in the present case clearly violated due process. The only factual issue presented regarding the challenged convictions was whether or not Mr. Jacoby was aware of the fact that the property he possessed was stolen. The jury was instructed that his possession of such property "gives rise to an inference" that he was aware that the property was stolen. The jury was required to draw the inference. The jurors could legitimately have been told that evidence of possession may give rise[7] to an inference that the accused knew that the property was stolen, but that language was not used. The prejudice was substantially increased by the fact that the jury was told that it must draw the critical inference unless Mr. Jacoby "satisfactorily explained" otherwise. This clearly shifted the burden of proof to the defense to prove that Mr. Jacoby was unaware that the property he possessed had been stolen.

Petitioners argue, at 14-15, that an earlier[8] general

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[7]The Arizona statute that sets forth the inferences arising from stolen property has been amended so that the possession of recently stolen property "may give rise" to an inference that the possessor is aware of the character of the property. A.R.S. §13-2305(1).

[8]The general instruction is found in the transcript four pages before the burden shifting instruction. (Pet. App. D, at 6-7).

instruction -- "[T]he question of whether to draw a particular inference is for you to decide," -- corrected the specific burden shifting instruction at issue here.[9] This alleged "clarifying instruction" can support the state's position only if, "The jury charge taken as a whole might have explained the proper allocation of burdens with sufficient clarity that any ambiguity in the particular language challenged could not have been understood by a reasonable juror as shifting the burden of persuasion." *Frances v. Franklin*, 471 U.S. at 318-319, *citing Cupp v. Naughten*, 414 U.S. 141 (1973). It is apparent that a reasonable juror in the present case could have: 1) understood that the specific inference concerning possession of stolen property was mandatory, while the general permissive inference instruction applied to other elements and other offenses; or 2) seen the instructions as contradictory. In either case, the court of appeals correctly concluded that due process was violated. *Id.* at 321-322.

B. The Violation of Due Process Was Not Harmless.

Finally, Petitioners claim that the court of appeals applied the wrong harmless error standard. Petitioners argue that the appellate court should have made a determination as to whether Mr. Jacoby suffered "actual prejudice" from the burden shifting

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[9]Petitioners argued both in the court of appeals and in their Petition for Certiorari that defense counsel's closing argument corrected the burden shifting instruction. Such a claim is baseless and was properly ignored by the court of appeals, as it must be here.

instruction[10], instead of applying a "harmless beyond a reasonable doubt" standard.[11] The instruction at issue violated due process because it infected the entire trial and therefore was properly considered under the harmless error standard. This conclusion is well supported by the court of appeals' analysis in *Suniga v. Bunnell*, 998 F.2d 664, 666-667 (9th Cir. 1993).

More importantly, the error in the present case required reversal under either standard. In fact, it would be difficult to find a clearer demonstration of the impact of an erroneous instruction. The jury was told to infer that the possession of stolen property carried with it knowledge that the property was stolen. Mr. Jacoby was alleged to have committed burglaries and controlled the property taken in the burglaries. He testified that he did not commit the burglaries at issue, that his confession to the police was false, and that he did not know the property recovered from his truck was stolen. He was convicted of knowingly controlling stolen property -- the charges affected by the instruction -- but was not convicted of the burglaries.

Even more significantly, a vial of cocaine was found on the seat next to where Mr. Jacoby was sitting in his truck. He testified at trial that he was a heavy cocaine user. Despite these inculpatory facts, the jury -- hearing no burden shifting instruction on the drug charge -- acquitted Mr. Jacoby of knowingly

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[10]*Brecht v. Abrahamson*, ___ U.S. ___, 113 S.Ct. 1710, 1722, 123 L.Ed.2d 353 (1993).

[11]*Chapman v. California*, 386 U.S. 18, 24 (1967).

possessing cocaine.

In short, Mr. Jacoby was convicted only of the charges tainted by the erroneous instruction. The court of appeals was correct in reversing the convictions for the tainted charges.

CONCLUSION

The court of appeals correctly decided this case on its merits. Clear precedents from this Court establish that the Due Process Clause was violated and that prejudice resulted from that violation. It is therefore respectfully submitted that the Petition for Certiorari be denied.

NO. 93-1354

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October Term, 1993

SAMUEL A. LEWIS, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, GRANT WOODS, ATTORNEY GENERAL FOR THE STATE OF ARIZONA,

PETITIONERS,

-VS-

PETER ALLEN JACOBY,

RESPONDENT.

STATEMENT OF MAILING
AFFIDAVIT OF SERVICE
REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

GRANT WOODS
ATTORNEY GENERAL OF
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ATTORNEYS FOR PETITIONERS

AFFIDAVIT

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

KENT E. CATTANI, being first duly sworn upon oath, deposes and says:

That he is a member in good standing of the United States Supreme Court Bar.

That on June 15, 1994, he caused to be shipped via Airborne Express, 40 copies of the REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI, in SAMUEL A. LEWIS, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, GRANT WOODS, ATTORNEY GENERAL FOR THE STATE OF ARIZONA, No. 93-1354, addressed to:

THE HONORABLE WILLIAM K. SUTER
United States Supreme Court
Office of the Clerk
1 First Street, N.E.
Washington, D.C. 20543

and caused to be deposited for mailing three (3) copies addressed to:

NATMAN SCHAYE
P.O. Box 608
Tucson, Arizona 85702
Telephone: (602) 743-9940

Attorney for RESPONDENT

That to his knowledge the mailing of the Petition took place on June 15, 1994.

Kent E. Cattani
KENT E. CATTANI